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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1959

No. 459

Public Service Commission of the State of New York,
Petitioner,

v.

Federal Power Commission, et al.,
Respondents.

No. 473

The United Gas Improvement Company,
Philadelphia Electric Company,
Petitioners,

v.

Federal Power Commission, et al.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN

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The interest of amicus curiae

The State of Wisconsin is one of the states of the United States. The Public Service Commission of Wisconsin is an agency of the State of Wisconsin, having jurisdiction, among other things, to regulate the adequacy of service furnished by and reasonableness of rates charged by public utilities engaged in the distribution and sale of natural gas in the State of Wisconsin. Both are interested in complete, effective and permanent regulation of matters relating to natural gas, to the end that the ultimate consumer will receive reasonably adequate natural gas service at just and reasonable prices. Both participated on brief and in oral argument in the case of *Phillips Petroleum Company v. Wisconsin*, 347 U. S. 672.

Their interest *amicus curiae* in the instant case lies in the fact that the judgment of the Court of Appeals sought to be reviewed could, if not corrected in this court, result in impairing the recent decision of this court in *Atlantic Refining Company v. Public Service Commission of New York*, 360 U. S. 378, which latter case also lays down a principle of great value and importance in providing all natural gas consumers with effective regulation.

Argument

The petitions in the above captioned causes filed by the United Gas Improvement Company, Philadelphia Electric Company, and Public Service Commission of the State of New York seek to have this court review and reverse the judgment of the United States Court of Appeals for the

Third Circuit in *United Gas Improvement Company, Philadelphia Electric Company, Public Service Commission of the State of New York v. Federal Power Commission*, (Opinion filed August 4, 1959) Hastie, Circuit Judge dissenting, which affirms an order of the Federal Power Commission issued in re *Transcontinental Gas Pipe Line Corporation*, G-13143, G-13590, G-13745, *et al.* on September 4, 1958 reported in 20 F. P. C. 264.

The State of Wisconsin and Public Service Commission of Wisconsin, as amicus curiae, urge that the petitions for certiorari be granted. The question upon which the legality of the aforesaid order of the Federal Power Commission depends, is governed by the decision of this court in *Atlantic Refining Company v. Public Service Commission of New York* (June 22, 1959), 360 U. S. 378, 3 L. ed 2d 1312.

The majority decision of the Court of Appeals, recognized the significance of this decision of this court, but in deciding the instant case, proceeded upon a theory which, if permitted to stand, would as a practical matter seriously impair the principle announced by this court in the *Atlantic Refining Company case*. In that case the opinion of the court delivered by Mr. Justice Clark, in discussing the obligation of the Federal Power Commission to consider the initial price of the gas in issuing a certificate of convenience and necessity for sale and delivery of gas by a producer to an interstate pipeline under Section 7(e) of the Natural Gas Act, said *inter alia*, page *1319:*

"The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591, 88 L. ed. 333, 64 S. Ct. 281 (1944). As the original § 7(c) provided, it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.' 52 Stat. 825. The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. * * *"

Then after further discussion as to the power and duty of the Federal Power Commission under Section 7 of the Natural Gas Act, this court said, pages 1320-1:

"* * * What we do say is that the inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7. Their proposals must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7(e) requires the Commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals

the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued."

The Court of Appeals, (majority decision), after reviewing the decision of this court in the above cited case and various factual data pertaining to the instant case, states in the instant case:

"It is the 'all factors' aspect which makes these cases so hard to decide. One Commissioner dissented in this case as he has in several proceedings prior. Members of a careful and experienced court divide when the Commission's order comes before them for review. *Oklahoma Natural Gas Co. v. Federal Power Comm'n.* 257 F. 2d 634 (D. C. Cir. 1958). See also *Florida Economic Advisory Council v. Federal Power Comm'n.* 251 F. 2d 634 (D. C. Cir. 1957).

"The balancing of the weight to be given the various factors is not unlike that which a court of equity through the years has given in deciding whether an injunction is to issue in a case before it. It involves an exercise of judgment and the reasons which sway that exercise may be hard to articulate in a particular case.

"The weighing of the factors and the conclusion to be reached is a task for the Commission. If the necessary elements have not been considered, the error is one of law and subject to court correction. If they have been considered and the conclusion reached is not unreasonable, the conclusion stands whether it is the one we should have reached or not. That, in our judgment, is the case here."

The foregoing concept, if not rejected by this Court, will have a most serious effect upon the doctrine of *Atlantic Refining Company v. Public Service Comm., supra.* The reason is that it in effect gives approval to having the Federal Power Commission simply state in other cases, "we have weighed all factors including price and in our judgment a certificate should issue." Such a result would give the Federal Power Commission a blank check in every case and make any subsequent court review an idle gesture.

The view taken by the Court of Appeals would permit the Federal Power Commission to proceed in this type of case without making proper findings of fact on the vital issue concerning the impact of price upon public convenience and necessity in this type of case, and hence would be contrary to fundamental principles as stated by this court in *United States v. Pierce Auto Freight Lines*, 327 U. S. 515, 533 and *Florida v. United States*, 282 U. S. 194.

We file this brief *amicus curiae* urging that the petitions for certiorari be granted in this case because the decision of this court in *Atlantic Refining Co. v. Public Service Comm., supra*, is a landmark case and lays down a basic principle of the utmost importance to all consumers of natural gas wherever situated in continental United States. It would be tragic if that decision were to lose its potency within 60 days of the time when it was delivered, but that, we fear, could be the result if the decision in the instant case is permitted to stand. The decision of the Court of Appeals in the instant case has an importance far beyond the con-

fines of this case, and we respectfully submit that the petitions for certiorari should be granted.

Respectfully submitted,

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